

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7284, 76-7297

United States Court of Appeals

FOR THE SECOND CIRCUIT

NAVIEROS OCEANIKOS, S.A.,
owner of the Liberian Vessel TRADE DARING,
Plaintiff-Appellant-Appellee,

—against—

S. T. MOBIL TRADER, her engines, boilers, etc., MOBIL OIL
CORPORATION, the owner of the MOBIL TRADER, and
MOBIL SALES & SUPPLY CORPORATION,

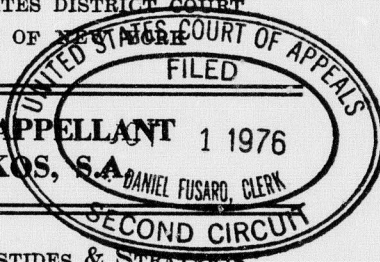
*Defendants and Third-Party
Plaintiffs-Appellees-Appellants,*

—against—

TRADE & TRANSPORT, INC.,
Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT 1 1976
NAVIEROS OCEANIKOS, S.A.



POLES, TUBLIN, PATESTIDES & STRATTON
*Attorneys for Plaintiff-Appellant-Appellee
and Third-Party Defendant-Appellee*
46 Trinity Place
New York, New York 10006
(212) 943-0110

THEODORE P. DALY
ALAN VAN PRAAG
Of Counsel

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLANT NAVIEROS OCEANIKOS, S.A.

The Issues Presented for Review

1. Did the Court below err in holding that the plaintiff was guilty of contributory negligence?
2. Did the Court below err in holding that contributory negligence is a bar to indemnity for breach of warranty?

of workmanlike service even when the alleged contributory negligence could not have hindered or prevented the warrantor from performing such service?

3. Did the Court below err in holding that the defendants' breach of their warranty of workmanlike service should result in liability for only 25 percent of the plaintiff's loss or damages?

Statement of the Case

A. Nature of the Case

This is an appeal by Navieros Oceanikos, S.A., ("Navieros" or "plaintiff"), as owner of the Steam Tanker *TRADE DARING*, from a decision and order of the United States District Court for the Southern District of New York, Honorable Henry F. Werker, in which the Court held that the plaintiff was entitled to recover only 25 percent of its damages from the Mobil Oil Corporation ("Mobil Oil" or "defendant") and Mobil Sales & Supply Corporation ("Mobil Sales" or "defendant"), who were found by the Court to have breached their warranty of workmanlike service in bunkering the *TRADE DARING*. The Court also dismissed the defendants' third-party complaint against Trade & Transport Inc., the third-party defendant (5a).*

Trial of this maritime action to the Court took place in June-July, 1975. The opinion of the Court was filed on February 27, 1976. Plaintiff's motion for reargument and for additional findings of fact was filed March 9, 1976.

* References to page numbers followed by "a" are to pages of the joint Appendix.

References to "Ex. Vol." followed by a page number are to pages of the Exhibit Volume of the Appendix.

Plaintiff's motion was denied in all respects by the Court's order and memorandum filed May 17, 1976 (29a).

The TRADE DARING had been damaged and became a constructive total loss as a result of a fire on board the vessel on March 18, 1971. The fire occurred in the course of bunkering by the barge MOBIL TRADER, owned by defendant Mobil Oil. Mobil Sales had undertaken by written contract to furnish bunkers to the TRADE DARING and other vessels represented by Trade & Transport, Inc., as agent. The within action was commenced on March 23, 1972, by the filing of a complaint by the plaintiff against the barge MOBIL TRADER and the two corporate defendants. The defendants filed an answer to the complaint on June 8, 1972 and, on the same date, filed a third-party complaint against third-party defendant Trade & Transport, Inc.

The plaintiff filed its appeal herein on June 10, 1976. On June 22, 1976, the defendants filed a cross-notice of appeal.

B. The Trial

At trial, the plaintiff produced testimony by deposition of the Master, the Chief Engineer, the Second Engineer, the Third Engineer, and a Motorman, Second Class, of the TRADE DARING. Their testimony by deposition had been taken in April, 1971, approximately a month after the fire of March 18, 1971. These witnesses testified concerning their qualifications and experience, the circumstances surrounding the fire, the efforts at fire-fighting, and the general layout and condition of the TRADE DARING with particular reference to the fuel tanks and pipe lines involved in the fire.

The essence of the testimony of the personnel of TRADE DARING on the primary issue, namely, the cause of the

fire, was that the TRADE DARING's engineer on duty at the time of the fire had ordered the MOBIL TRADER to stop pumping at 0042 hours but that the order had not been carried out until after a second order was given at 0050 hours (8a-9a).

The plaintiff produced at trial a naval architect, Mr. Doros Argyriadis, who was familiar with the TRADE DARING from attendance on board the vessel before and after the fire of March 18, 1971. Mr. Argyriadis, by means of drawings and testimony, described the design and layout of pertinent areas of the TRADE DARING. He testified that the TRADE DARING was designed in conformity with good engineering practice and was maintained in class and in full compliance with all requirements of the American Bureau of Shipping and other regulatory authorities. He also established by reference to the TRADE DARING's tank capacities, the pumping rate of the MOBIL TRADER, and the testimony of the percipient witnesses, that the proximate cause of the fire was the overflow of bunkers in the engine room of the TRADE DARING as a result of the failure of the MOBIL TRADER to execute the order to stop bunkering at 0042 hours (Ex. Vol. 225-229).

The plaintiff also produced at trial a representative of the American Bureau of Shipping with records that confirmed that the TRADE DARING was fully "in class" and that the vessel's fire-fighting equipment was in full compliance with all requirements. These records also established that the TRADE DARING was in full compliance with the Safety of Life at Sea Convention (1960) (SOLAS-1960), even though the TRADE DARING, built in 1955, was not subject to the Convention (6a-7a).

The plaintiff also called Mobil Oil's Marine Counsel, Mr. Thacher W. White, to testify concerning the circum-

stances surrounding his interviews of the MOBIL TRADER's personnel several hours after the fire of March 18, 1971. Material inconsistencies between the depositions of the MOBIL TRADER's personnel and their statements to Mr. White had suggested to plaintiff that the correctness and completeness of Mr. White's report of these interviews be established. Further, several days before the trial, the existence of an investigative report prepared by Mobil's "fire expert" Captain Philip Neal, came to light. This report had not been disclosed by defendants, as required, in response to answers to interrogatories (46a-48a). The investigation by Captain Neal had been conducted on board the TRADE DARING several weeks after the fire at the request of Mr. White. The circumstances surrounding this investigation and preparation of the report was another subject of Mr. White's testimony (44a-48a).

The defendants produced at trial Dr. Walter A. Maclean, a teacher of engineering, who had little, if any, practical experience as a naval architect in the design of ships (108a). He was called by defendants to testify that the design or layout of the TRADE DARING was in violation of the regulations of various classification societies and was unacceptable according to sound marine engineering practices. Dr. Maclean had never been on board the vessel and was, in fact, ignorant of official plans of the TRADE DARING that had been furnished to defendant's counsel long in advance of trial (120a-136a). The basis of Dr. Maclean's criticism of the design or layout of the TRADE DARING was a drawing of whose origin Dr. Maclean was unaware (135a-136a). It had been prepared by defendant's counsel (196a). Dr. Maclean also testified concerning the bunkering procedures that the TRADE DARING personnel had followed at or about the time of the fire. Dr. Maclean had not sailed in 23 years (113a) and was unfamiliar with

the United States Coast Guard's classifications of inflammable and combustible products, essential information for their safe handling (137a; see also pp. 146-149 of the original trial transcript).

On re-direct examination, after recess, Dr. Maclean was led to offer a new theory of the overflow, namely, that a smaller bunker tank filled much earlier in the course of bunkering had overflowed and not the large side tanks that were being filled when the order to stop bunkering was given at 0042 hours (156a-161a). This theory was nowhere mentioned in the detailed "Proposed Findings of Ultimate Facts" submitted by defendants prior to trial. This hastily contrived theory had the advantage of surprise and presented the difficulty to plaintiff on rebuttal of "proving a negative" but it was logically unsound and inconsistent with other established facts (171a-178a; 403a-404a; 409a-415a). It was rejected by the Court (11a).

Defendants also produced at trial a marine surveyor, Captain Henry Halboth, who had attended on board the TRADE DARING several weeks after the fire. His testimony was the ultimate basis of Dr. Maclean's criticism of the layout of the TRADE DARING's venting and fuel transfer systems. His testimony concerning the layout of the TRADE DARING's fuel transfer system was, in some respects, inconsistent with the report he prepared shortly after his survey (237a). His testimony was also inconsistent with the TRADE DARING's official plans, photographs taken after the fire, and the testimony of others, particularly that of naval architect Argyriadis, as the Trial Court found (11a). Halboth was not a marine engineer (210a).

Defendants also produced the purported "fire-expert" Mobil Oil's Marine Safety Advisor, Captain Phillip Neal. Captain Neal was produced by the defendants to criticize

the vessel's fire-fighting system as being violative of various laws and regulations. His testimony was also critical of the fire-fighting procedures followed by the personnel of the TRADE DARING in attempting to extinguish the fire. Captain Neal was forced to concede that the TRADE DARING was in compliance with applicable laws and regulations including the requirements of the American Bureau of Shipping and SOLAS-1960 requirements (253a-262a). He also conceded that the regulation of the United States Coast Guard requiring a carbon dioxide fire extinguishing system, referred to in his direct testimony, was not applicable to the TRADE DARING because it was a foreign flag vessel and that the regulation was not even applicable to *U. S. flag vessels* built prior to 1969 (270a-272a). The TRADE DARING was built in 1955. His criticism of the fire fighting procedures was demonstrated to be without substance and based, in fact, upon ignorance of conditions that existed on the TRADE DARING and at the pier at which the vessel was berthed at the time of the fire (277a-279a, 284a-288a).

The defendants also produced Captain Herbert Banks and Pumpman Tranquillo Milano of the MOBIL TRADER. Milano had been on duty and was in charge of bunkering the TRADE DARING at the time of the fire. Captain Banks had been asleep in his cabin in the MOBIL TRADER up to or at the time of the fire (Ex. Vol. 51). Captain Banks and Pumpman Milano were produced at trial primarily to establish that Pumpman Milano had received only one order from the TRADE DARING to stop pumping, an order given at 0042 hours; and that he had already completed bunkering at the time. Both Captain Banks and Pumpman Milano were cross-examined at trial on their statements given to Mr. White, Mobil Oil's Marine Counsel, and on their prior testimony by deposi-

tion.* Both parties produced additional testimony by deposition and considerable documentary evidence by way of further support or elaboration of their positions.

The Trial Court, in its opinion, concluded:

(a) that the fire on board the TRADE DARING on March 18, 1971 had been caused by the defendant's breach of their warranty to perform the bunkering service in a diligent and workmanlike manner in that Pumpman Milano had failed to stop pumping when ordered at 0042 hours (14a).

(b) that the TRADE DARING was in all material respects in compliance with applicable regulations or other requirements for the design and maintenance of her fire-fighting equipment and that her vent and fuel transfer systems were designed and maintained in accordance with applicable laws or regulations and with sound engineering practices (6a-7a); and

(c) that the TRADE DARING's personnel had performed properly in their efforts to fight the "flash" fire (10a).

The Trial Court also held that the TRADE DARING was contributorily negligent in having ordered more bunkers than the vessel required, thus creating a "false expectation" in the minds of the defendants' personnel that the full quantity of bunkers ordered could be safely

* Although Captain Banks and Pumpman Milano were produced in response to a notice of examination of defendants, the Trial Court ruled that the depositions were not admissible. Plaintiff offered the depositions as depositions of a party (345a-346a, 448) and briefed the matter to the Court in its "Post-Trial Brief". The error appears harmless in light of the Trial Court's decision; however, these depositions should have been admitted in evidence if for no other reason than to limit speculation and argument in post-trial briefs, or in briefs on appeal, that could be refuted if the depositions were available (346a).

pumped aboard the TRADE DARING (14a). The Trial Court also held that the plaintiff was contributorily negligent in that the TRADE DARING's personnel had not been properly trained with respect to a standard operating procedure to deal with the overflow when it occurred, as evidenced by the failure to act in time to prevent an overflow (14a).*

Following the issuance of the Trial Court's opinion, the plaintiff moved for reargument and for additional findings of fact. The motion was denied (17a-29a).

C. Facts

Navieros Oceanikos was the owner of the M/V TRADE DARING, a combination oil/ore carrier built in Germany in 1955, to the highest classification standards of the American Bureau of Shipping and Germanischer Lloyd (Facts 1 and 18).** In 1970, the vessel, then named the BERTHA ENTZ, was purchased by the plaintiff from its German owner. The plaintiff at that time discontinued the vessel's German classification but continued the classification of the vessel with the American Bureau of Shipping. The vessel had been inspected both for classification purposes and for safety and fire-fighting equipment purposes as recently as March 1, 1971, and was found to be in compliance with all pertinent laws, rules and regulations (36a; Ex. Vol. 23-46). On March 18, 1971, at 0050 hours, the M/V TRADE DARING was fully in class with the American Bureau of Shipping (36a).

* The Trial Court also held that the plaintiff was at fault in not closing the "safe oil pipeline system during bunkering" and in failing to meet Liberian licensing or "manning requirements" (13a). These "faults" were not the basis for the Trial Court's reduction or apportionment of damages (14a).

** "Fact" or "Facts" refers to "Undisputed Facts" submitted by the parties to the Court prior to trial and included in the Record on Appeal but not in the joint Appendix.

The M/V TRADE DARING was originally constructed to utilize three grades of fuel oil: Bunker-C (black oil) for boiler service, marine diesel oil for the main propulsion engine, and gas-oil (light oil) for generators. At the time of the fire, marine diesel was being utilized for both the generators and propulsion engine and the gas-oil tanks were used for diesel oil (Ex. Vol. 226; 57a, 65a).

The TRADE DARING's bunkering tanks consisted of two large side tanks* (173.8 long tons, port; 218.4 long tons, starboard); two settling tanks (33.1 long tons each); two "diesel" day tanks (combined capacity of 31 long tons); a "gas-oil" storage tank (55.5 long tons); a small "gas-oil" day tank (3.7 long tons). There was additional tank capacity outside the engine spaces. There were also two connected overflow double-bottom tanks under the floor plating in the engine room with a combined capacity of 23.1 long tons (Ex. Vol. 226, 230, 264).

Bunkers are not normally carried in the overflow double-bottom tanks except for the drippings and returns from the main engine and auxiliary generators and from the save-all system** in addition to whatever is received into the overflow system. As long as the vessel's engines and generators are operating, there will be a steady flow or dripping into the leakage collection tank which, depending on the amount, may also go into the overflow double-bottom tanks. Some overflow into the overflow tank may also occur

* These are the two large side tanks that were being filled at the time the order was initially given to "stop bunkering" at 0042 hours. Overflow from these tanks into the overflow double-bottom tanks ultimately resulted in the overflow into the engine room (Ex. Vol. 228-230).

** The save-all system consists of collecting basins or troughs around or at the foot of various fuel tanks that serve to collect droppings or "bleedings" from the tanks for conveyance through appropriate piping ultimately to the overflow double-bottom tanks.

when transferring fuel to fill the respective tanks and the gas-oil day tank (Ex. Vol. 226).

Each side tank, settling tank, the Bunker-C tank, the gas-oil tank and the gas-oil day tank had an overflow pipeline leading to the overflow-double-bottom tanks. The diesel oil day tanks connect to the settling tanks as an overflow precaution, or may overflow to the collecting basins of the settling tanks and from there conveyed by appropriate piping to the overflow-double-bottom tank (Ex. Vol. 226).

During bunkering the normal practice is that the inflow of bunkers is visually monitored at the receiving tank to allow immediate communication with, and immediate control by, personnel at the pumps of the bunkering vessel (Ex. Vol. 226).

A venting system or piping, such as that of the TRADE DARING, is built into every tank, double-bottom or cofferdam, to allow for the escape or entry of air when the void is filled or emptied. Without vents, the pressure of gas or liquid may rupture the tops or sides of tanks (Ex. Vol. 227).

The TRADE DARING's venting system was designed in such a way that the only openings were above deck level for the escape or venting of gases to the atmosphere. No ignitable gases or fuel oil could possibly be discharged into the engine room of the TRADE DARING through the vent system (Ex. Vol. 227).

The design and construction of the fuel oil tanks, including deep tanks, service and settling tanks, and overflow tanks and the venting, overflow and save-all systems of the TRADE DARING, were in full and complete compliance with the classification requirements of the American Bureau of Shipping (140a-141a). These fuel

and venting systems as constructed were in compliance with classification requirements and would even be in compliance with the 1971 requirements of the Bureau. They were also in compliance with existing United States Coast Guard regulations to the limited extent applicable to this foreign-flag vessel. None of these tanks or systems presents any feature which would be in need of modification even by today's requirements (Ex. Vol. 227).

The fire-fighting and safety equipment on board the vessel at the time of the fire was in conformity with, or in excess of, all requirements of the American Bureau of Shipping, the agency that serves as authorized agent for applying the Safety of Life at Sea—1960 (SOLAS—1960) requirements (254a-261a, 268a-269a; Ex. Vol. 228).

The officer complement of the engine department of the TRADE DARING at the pertinent times consisted of Chief Engineer Sofroniou, Second Engineer Spetsiotis and Third Engineer Bafaloukos.

Bafaloukos had been going to sea since 1957, approximately 14 years prior to the fire (Ex. Vol. 59). Prior to his engagement on board the TRADE DARING, he served as a Third Engineer on the following diesel powered vessels: AVANCES, AIMA METHENITI, KILINI and KARPATOS (Ex. Vol. 59-61). He had sailed as Third Engineer for more than three years. He held related engineering licenses issued by the Greek Ministry of Merchant Marine: a fireman's license as well as a license as a Second Class Engineer Driver (Ex. Vol. 61-63). Bafaloukos was thoroughly familiar with bunkering of vessels, having participated in the bunkering of the TRADE DARING on other occasions prior to the fire. During the period that he had sailed as Third Engineer, he had bunkered many other vessels (Ex. Vol. 117).

Second Engineer Spetstiotis had been going to sea for approximately 9 years (Ex. Vol. 125-126). He had sailed on diesel-powered vessels as Third Engineer for approximately six years, and one year as a Second Engineer (Ex. Vol. 126).

The Chief (First) Engineer, Sofroniou, has been sailing since 1950 and as a Chief Engineer since 1964. He held a Chief Engineer's license from the Greek Ministry of Merchant Marine (Ex. Vol. 166-168).

The testimony of the vessel's engineers in this action was taken in April 1971, that is, within several weeks after the casualty and more than four years prior to trial.

On March 16, 1971, the TRADE DARING arrived in New York with a cargo of fuel oil for discharge at Hess Oil Terminal, Perth Amboy, New Jersey. Discharging was completed in the evening of March 17, 1971 (Fact 6).

On that same day, Trade & Transport contacted Mobil Sales to order bunkers for the TRADE DARING. Trade & Transport and Mobil Sales had executed a contract dated January 1, 1971, requiring Mobil Sales to furnish bunkers at various ports throughout the world to vessels designated by Trade & Transport (Fact 3).

Following receipt of this order for bunkers, the MOBIL TRADER owned by Mobil Oil was dispatched to Port Mobil at about 1300 hours on March 17, 1971 (Fact 31).

The MOBIL TRADER has four cargo tanks subdivided, port and starboard, into eight (8) compartments (305a). At Port Mobil, the MOBIL TRADER reportedly loaded the following quantities of marine diesel oil into the following tanks: 25-26 tons in No. 1 port tank and 349 tons in No. 3 tank (port and starboard) (360a-361a; Ex. Vol. 15).

At about 1900 hours, March 17, 1971, the MOBIL TRADER proceeded from Port Mobil to the Hess Terminal in order to deliver bunkers to the TRADE DARING. The MOBIL TRADER was made fast to the TRADE DARING about 1920 hours. At that time, the TRADE DARING had not completed discharging her cargo. At about 2220 hours, the hose connection between the TRADE DARING and MOBIL TRADER was made (353a; Ex. Vol. 50; Fact 36).

At about 2250 hours (371a, 361a; Fact 36; Ex. Vol. 50) Milano, the pumpman of the M/T MOBIL TRADER, commenced pumping bunkers into the TRADE DARING.

Shortly before bunkering commenced, there had been two brief conversations between the personnel of the MOBIL TRADER and the TRADE DARING. These conversations involved discussions of the quantity of bunkers, the rate of pumping and the order to commence pumping (375a). The transfer hoses were supplied by the MOBIL TRADER and connected to the intake manifold on the TRADE DARING by the TRADE DARING's personnel (Ex. Vol. 50).

Tranquillo Milano, Pumpman of the MOBIL TRADER, was in charge of the pumping operation. He had been on duty since 0700 hours that morning (348a). Milano testified at trial that he commenced pumping out No. 1 port tank slowly to insure that the lines were secured and that there was no back pressure (357a-358a). He then increased pumping speed to the maximum rate of 200 tons per hour (357a). The pump could pump at less than but not at more than that rate (390a). It took him 20-25 minutes to complete pumping out No. 1 port tank (361a). It takes approximately 2-3 minutes to strip a tank (362a). "Stripping" involves use of a smaller suction pipe to remove the small quantities at the bottom of the tank.

After stripping No. 1 port tank, he went aft, closed two cross-over valves and opened No. 3 port tank and No. 3 starboard tank and started pumping at the rate of 200 tons per hour. There was approximately 349 tons of diesel oil in No. 3 port tank and No. 3 starboard tank, which, at the rate of 200 tons per hour, would take approximately one and three quarters hours to pump out (361a-363a).

Bafaloukos, the Third Engineer of the TRADE DARING, had been assigned by the Chief Engineer the task of viewing the level of bunkers in the side tanks with a flashlight (Ex. Vol. 64-65). These levels can be observed through open manholes on deck just forward of the rear accommodation (Ex. Vol. 65). He had received instructions from the Chief Engineer that when the level of bunkers in the tanks reached the second rung of the ladder from the top, he should notify the barge (MOBIL TRADER) to stop pumping (Ex. Vol. 71). When Bafaloukos observed the bunkers almost at the second rung, he walked across the deck to notify the barge to stop pumping (Ex. Vol. 72).

When Bafaloukos arrived at that point on deck overlooking the MOBIL TRADER, he saw no one at the pumping station or on the deck of the MOBIL TRADER. He called out many times and then a man, the barge man, came out of the accommodation area of the barge, on the right side. Bafaloukos told the barge man by voice in English and hand signal to stop bunkering. "Shutting out" or halting the flow of bunkers before delivery of the full quantity ordered is not at all unusual (342a-343a).* The Pumpman acknowledged the order by saying "Okay"**

* The Trial Court appears to have overlooked this testimony. See "Point I.A., *infra*."

** The Trial Court appears to have overlooked this testimony and stated that the order was not acknowledged to Bafaloukos (10a).

(Ex. Vol. 73-74; Ex. Vol. 1 (photographs "5" and "6")). The time was 0042 hours March 18, 1971 (Ex. Vol. 74).

Bafaloukos then closed the manholes on deck through which he had been observing the levels of bunkers in the receiving tanks (Ex. Vol. 1 (photograph "3"); Ex. Vol. 74). It would take some brief time for the bunkering hose to drain (155a) so that there would be no spillage when the connection was broken at the ship's manifold (155a). Bafaloukos then went to advise the Chief Engineer that bunkering had been completed and then went to the engine room (Ex. Vol. 74). As he descended the ladder in the engine room, he noticed liquid rushing past the sight-glasses in the large pipes that lead from the side tanks to the overflow double-bottom tanks. It was about 0049 (Ex. Vol. 86, 107-108). It will be recalled that Bafaloukos had ordered the barge to stop pumping just before the oil reached the second rung from the top of the ladder in the side tanks. Just above that point, at about one and one-half rungs from the top, is the outlet for the overflow pipe (Ex. Vol. 74). Bafaloukos, as he was racing up the stairway, called out to Second Engineer Spetsiotis, that he had ordered the bunkering to stop but the oil was overflowing (Ex. Vol. 76-77).

The Second Engineer went to the sight glasses himself and confirmed the overflow and then ran to the control valve on the uppermost platform and closed off the central intake valve "even if the pipe burst" and then closed the individual valve to the right-hand side tank (Ex. Vol. 127-129).

Meanwhile, Bafaloukos went to the main deck and, seeing the Master on the middle accommodation deck, called to him to have the barge stop pumping (Ex. Vol. 77). They both called to the barge man who re-appeared, from the accommodation area at the right-hand door, as on the prior

occasion at 0042 hours. It appeared to Bafaloukos that the barge man reduced the speed of the pump motor and closed some valve on the deck of the barge (Ex. Vol. 78). Bafaloukos closed the intake valve on the deck of the TRADE DARING (Ex. Vol. 78). The time was 0050 hours on March 18, 1971 (Ex. Vol. 109).

Meanwhile, Captain Cesare Del Greco, the Master of the tug GRACE McALLISTER, came to the scene. He had been assigned to undock the TRADE DARING at 0100 hours, March 18, 1971 (Ex. Vol. 315-317). At about 0030 hours, March 18, 1971 Pilot Del Greco was awakened in order to go aboard the TRADE DARING and to direct the undocking operation (Ex. Vol. 317). At approximately 0045, he left the GRACE McALLISTER by way of the main deck, stepped off the GRACE McALLISTER and descended to the pier (Ex. Vol. 317-318). He observed that the TRADE DARING's gangway had been pulled in and the only way to board the vessel was by means of the pilot ladder hanging from the port side (Ex. Vol. 318). After a brief conversation with some Hess employees on the pier (Ex. Vol. 319), he ascended the pilot ladder.

After clambering over the railing of the TRADE DARING, Captain Del Greco crossed the deck of the vessel to the starboard side to ascertain if the bunkering barge (MOBIL TRADER) was still tied up alongside of the vessel (Ex. Vol. 320). From the time he first boarded the TRADE DARING until the time he looked over the starboard side, 10 to 15 seconds had expired (Ex. Vol. 321). He looked over the starboard side of the TRADE DARING onto the deck of the MOBIL TRADER which was fairly well illuminated by floodlights and did not notice anyone on deck (Ex. Vol. 320, 328). As he looked over the side of the TRADE DARING onto the MOBIL TRADER, he heard "at least one engine running at high speed with a lot of

exhaust . . ." (Ex. Vol. 322). It was running full or near full (Ex. Vol. 329). He also observed a hose connected from the barge to the manifold of the TRADE DARING. "The boom was swung over towards the TRADE DARING and . . . the hose was supported by several saddles and the hose was swinging around fore and aft and up and down in the saddles kind of violently . . ." (Ex. Vol. 323). He then turned around and had walked 15 to 20 feet from the starboard railing, when "two big balls of fire" came out of the skylights near the stack at the stern of the TRADE DARING (Ex. Vol. 324). No more than 30 seconds had elapsed from the time Del Greco boarded the TRADE DARING until he saw the balls of fire coming out of the skylights (Ex. Vol. 324). He had a startled reaction and was "sort of gaping." Then he went over to the starboard side of the ship and "hollered" to the barge to disconnect and "get the hell out of there" (Ex. Vol. 325).

Meanwhile, in the engine room, Second Engineer Spetsiotis, saw that bunkers had backed up through the scuppers that run from a catch-basin at the base of the small gas-oil day tank, to the overflow double-bottom tanks. The oil had reached the point where the catch-basin around this tank was overflowing, with the oil spilling down on No. 3 generator on the lowest level of the engine room (Ex. Vol. 132-133, 161-163). Bafaloukos, who was then back in the engine room, was ordered by the Second Engineer to cover the generator while he, the Second Engineer, ran to cut off the power on the left side of the vessel. He then called to Bafaloukos to stop No. 3 generator (Ex. Vol. 133-134). At the very moment that Bafaloukos stopped the No. 3 generator, flames burst out on and around the generator (Ex. Vol. 134). The time was 0052-0053 hours on March 18, 1971 (Ex. Vol. 86, 152).

Immediate steps were taken to combat the fire with hand extinguishers (256a-257a; Ex. Vol. 85, 135). The fire-fighting system (the foam system) (Ex. Vol. 188-189) could not be brought into use because the diesel generator which activates the water pumps, was almost immediately made inaccessible to the crew by the fire (Ex. Vol. 148-150). As the Second Engineer explained in his testimony, there was nothing further that could have been done (Ex. Vol. 135, 152). Ultimately, the vessel had to be abandoned (Ex. Vol. 203-208) as a total loss (Ex. Vol. 57).

The bunkering of the TRADE DARING by the MOBIL TRADER had continued for at least eight minutes (0042-0050) after Bafaloukos had first ordered the bunkering to stop. Since the bunkering had proceeded at a rate of approximately 200 tons per hour (357a), or $3\frac{1}{3}$ tons per minute, it would seem that more than 25 tons of bunkers were pumped aboard after the bunkering had been ordered to halt. This would be more than necessary to cause the level of bunkers to rise from the second rung of the ladder (the level at the time bunkering was ordered to be halted), to reach the overflow outlet in the side tanks and to fill up the overflow double-bottom tanks (Ex. Vol. 228).

Several hours after the fire, Mobil's Marine Counsel, Mr. Thacher White, boarded the MOBIL TRADER at Port Mobil and interviewed personnel of the MOBIL TRADER (Ex. Vol. 47). Mr. White remained on board the MOBIL TRADER for approximately two hours. He interviewed Captain Banks, Pumpman Milano and (to a limited extent) Deckhand Beekman (39a-40a). He prepared a seven page typewritten report of his interviews of the personnel of the MOBIL TRADER, setting forth general descriptions of the MOBIL TRADER and the TRADE DARING and their location or positions at the time of bunkering, personal and employment histories of the persons he inter-

viewed, together with a detailed chronological account of the bunkering operation and of the observations of the MOBIL TRADER's personnel immediately preceding, during and after the fire (Ex. Vol. 47-53).

Milano testified at trial that he completed pumping out No. 1 port tank 20-25 minutes after commencing pumping at 2250 hours. This would mean that the earliest he could have completed pumping out No. 1 port tank would have been 2310 hours (361a). He further testified that it would take about one and three-quarters hours to complete the discharge of the remaining 349 tons in No. 3 port and starboard tanks (361a). By simple arithmetic, taking into account the 2 to 3 minutes required to strip the last tank, No. 3 port tank (362a) the earliest pumping could have been completed was 0057 hours. This figure, 0057 hours, also does not take into account the time lost or spent in other operations, manipulating valves, reducing the pumping speed when stripping No. 3 starboard tank, etc. (361a-363a).

Using as a point of reference the report of the oral statement given by Milano to Mobil's Marine Counsel several hours after the fire, it is clear that Milano could not have completed bunkering even by 0100 hours on March 18th. According to Mobil's Marine Counsel's report dated March 22, 1971 (Ex. Vol. 51):

"At 0045 hours Milano began stripping tanks, first the starboard and then the port and started blowing the line."

Utilizing this point of reference (the commencement of stripping of No. 3 starboard tank at 0045 hours), it is clear that Milano could not have completed bunkering until approximately 0108 hours. The bunkering procedure he described at trial was such that when he commenced stripping the No. 3 starboard tank, there was still some

500 barrels (approximately 70 tons) in No. 3 port (361a-363a). Pumping of 70 tons at 200 tons per hour takes 21 minutes. He then would have required another 2 to 3 minutes to strip No. 3 port tank. This would mean that he could not have completed the entire operation before 0108 hours on March 18th.

As the Court below found, Milano failed to stop pumping when first ordered and his testimony that he had completed bunkering at 0042 hours was "chronologically impossible" (8a). If Milano had promptly complied with the order to stop bunkering at 0042 hours, the overflow and fire would never have occurred (Ex. Vol. 229; 9a).

ARGUMENT

POINT I

There Was No Contributory Negligence or Fault on the Part of the Plaintiff.

The Court found that the MOBIL TRADER was at fault in that its pumpman, Milano, did not execute the order given to discontinue pumping at 0042 hours. This was a breach of the defendants' duty to perform the bunkering services in a diligent and workmanlike manner (14a).

The Court also concluded that negligence on the part of the plaintiff combined with the defendants' breach of warranty was such that the responsibility for the damages may not be placed solely on the defendants. The Court held that the plaintiff was negligent in: (A) ordering more bunkers from the defendants than the TRADE DARING required, thus "creating the false expectation" that the amount ordered could be safely pumped on board; and (B) in failing to train its engineering personnel to

deal with the overflow (14a). These findings of contributory negligence are discussed separately below.

A. Quantity of bunkers ordered in excess of vessel requirements created "false expectation" that amount ordered could be pumped aboard without casualty.

The agent for the TRADE DARING ordered 375 tons of bunkers from Mobil Sales. The computed remaining capacity of the TRADE DARING as of the time bunkering commenced on March 17, 1971, was somewhat less than 375 tons (11a). There was *absolutely no testimony* at all by anyone that the ordering of 375 tons either (a) created a "false expectation" that the quantity of bunkers could be pumped aboard the vessel without casualty; or (b) that this "false expectation" should have caused a qualified pumpman to delay in carrying out the order to stop pumping. No issue of fact or credibility is involved.

One might argue that a layman or someone totally unacquainted with the safe handling of combustible cargoes could harbor such a "false expectation" based on the quantity of bunkers ordered. But those who are engaged in the handling of combustible cargoes should be aware of the necessity for obeying orders or directions given during the process of handling such cargoes.

The evidence is clear and uncontradicted and *based on the testimony of defendants' own witness, Captain Banks*, that the quantity of bunkers ordered should not create any expectation that any given quantity could be pumped aboard the receiving vessel. It is quite common for vessels to order more bunkers than they might be able to carry so as to be sure that sufficient bunkers are brought to the vessel to fill her to capacity. Captain Banks admitted that a vessel's ordering more bunkers than it might

be able to carry is a rather frequent occurrence in the port of New York.

Captain Banks testified as follows (342a-343a):

"Q. Captain, why do vessels shut out cargo occasionally?

A. Basically because they can't take the product.

Q. And they order more than they can take, really?

A. Sometimes.

Q. *It is common enough, isn't it?*

A. *Yes.*" (Emphasis supplied)

In fact during the period March 16-19, 1971 (the TRADE DARING was bunkered on March 17-18, 1971), according to the log book of the MOBIL TRADER, "shut-outs" occurred on March 16 and March 19 on bunkered vessels other than the TRADE DARING. Captain Banks testified as follows (339a-340a):

"Q. Looking at the dates March 16, 17, 18 and 19, can you tell us on how many occasions cargo was shut out from the Mobil Trader?

A. On March 16 we had a shut-out.

Q. And how much was that shut out?

A. 23,002 gallons.

Q. Do you know how many tons that would be?

A. Not offhand, no, sir.

Q. Do you have an approximation?

A. No, I don't.

Q. That was on March 16?

A. 16th, right.

Q. What about March 17, any shut-outs on that date?

A. No, sir.

Q. March 18, any shut-outs on that date?

A. No, sir.

Q. How about March 19?

Mr. Juliano: I object. Irrelevant.

The Court: I will let him answer.

A. I have down here pumping, shut-out. Right.

Q. How much was shut out?

A. 27,110 tons.

The Court: *Tons? Gallons?*

A. Excuse me. Gallons, gross gallons."

In other words, the amount of bunkers a vessel orders should not create any firm expectation in the minds of the personnel aboard the bunkering vessel as to the quantity that can be received since they should know full well that vessels frequently order more bunkers than they can carry. In fact, as Captain Banks testified, there is a well-recognized signal, the signal Bafaloukos gave in this case to the pumpman of the MOBIL TRADER, to order the halt of bunkering. Captain Banks testified as follows (340a-341a):

"Q. I believe you testified on direct examination that ordinarily when cargo is shut out by a vessel, which means it doesn't really want to take any more, I suppose, in ordinary course that is done by a signal from the personnel of the vessel to the barge, is that correct, in ordinary course?

A. Yes.

Q. And you did mention that in certain emergency situations, perhaps the vessel itself might close out?

A. Yes.

Q. In ordinary course it would be a simple waving of the hands, as I'm doing now, crossing the wrists back and forth, is that so?

A. That is right."

In addition to the fact that vessels often order more bunkers than they can receive, to insure that they will "fill up" when taking bunkers in ports where bunkers are relatively inexpensive, there are many conditions that can develop in the course of bunkering that require immediate stoppage of the transfer: leakages, valve failures, back-ups, blockages, etc. The conclusion that an alert pumpman might disregard an order to "stop pumping" because of a "false expectation" of the quantity a vessel can receive is utterly unrealistic and even the defendants produced no testimony to support it.

Another of defendants' employees, Elliott Kelley, a gauger, testified how he, when manning the delivery pumps for Mobil, always stood within sight of the man on board the receiving vessel. Thus, if a signal were given, he could shut off delivery immediately. He testified that while he personally had not had any accidents, there have been such spillages caused by overflow at Port Mobil. He testified as follows (Ex. Vol. 297):

"Q. Were you standing by this valve at all times when this was being loaded?

A. Within walking distance of it.

Q. And within the sight of the pump man on board

A. Yes.

Q. So that if he gave you the signal, you could shut it off immediately and avoid a spill, is that right?

A. Yes.

Q. That's very important, isn't it?

A. Yes, very important.

Q. Have you ever had any spillages down at Port Mobil vessels of overflowing of your barge tanks?

A. I never had, no.

Q. Have you heard of any out there?

A. We have had accidents, yes."

It is respectfully submitted that the Court below, in the absence of any testimony to support the finding and contrary to the evidence from defendants' own witnesses, simply assumed the existence of a "false expectation" in the mind of pumpman Milano. Milano should not have had, and certainly should not have acted upon, any such "false expectation." There is no justification for any such "false expectation" and certainly no justification for permitting such "false expectation" to override the order, given verbally and by hand signal to the pumpman of the MOBIL TRADER, to "stop bunkering."

B. Failure of the Third and Second Engineer to close the main intake valve on deck or in the engine room in sufficient time to prevent the overflow evidenced failure of plaintiff to train personnel with respect to a standard operating procedure in the event of an overflow.

The Trial Court's holding appears to be based on overlooking or misreading the uncontroverted evidence. The Court stated: "The DARING was equipped with valves at the bunkering manifold and in the engine room which would have permitted the third engineer to shut off the bunkering. These were not used even after the overflow was evident" (12a).

The uncontroverted evidence is to the contrary.

As soon as Third Engineer Bafaloukos noticed the overflow through the sight glasses that led from the side

tanks to the overflow double-bottom tanks, he raced up the engine room stairway calling out in passing to Second Engineer Spetsiotis to advise him of the overflow. Spetsiotis immediately confirmed the overflow by looking at the sight glasses in the overflow pipes and ran to the control valve and closed off the central intake valve (Ex. Vol. 128-129). As Second Engineer Spetsiotis put it, he closed the main intake valve below deck "even if the pipe burst" (Ex. Vol. 128). Meanwhile, Bafaloukos ran to the main deck, called to the Master on the deck above, the middle accommodation deck, to again order the barge to stop pumping and closed the main intake valve on deck himself (Ex. Vol. 77-78).

It is difficult to see that any degree of training could have resulted in these two engineers' doing anything other than what they did and *there is no substantial testimony* by any of the defendants' witnesses that anything further could have been done by the vessel's engineers when the overflow was discovered. Defendants' purported fire expert, Captain Neal, did suggest that when the overflow was noticed by the TRADE DARING's engineer, the incoming bunkers might have been diverted to some forward tanks. His criticism was based on ignorance or misunderstanding of the vessel's fuel tank and piping system. When asked how this diversion could have been accomplished, he said that he could only "guess" (288a). He did not know if this would require opening valves forward, or if there were such valves (289a).

In any case, the Court apparently concluded that Neal's testimony on this point was so insubstantial or speculative that when plaintiff sought to meet it—for whatever it was worth—with rebuttal testimony from naval architect Doros Argyriadis, the Court understandably ruled against receiving such rebuttal testimony (406a).

It is respectfully submitted that the Trial Court, instead of examining the specific actions taken by the TRADE DARING's engineers after the overflow was discovered, concluded that the "evidence" to prove their failure was the fact they did not succeed. In doing so, the Trial Court misread the record or simply overlooked the evidence of what actually was done. As the Trial Court expressed it, the fault was "evidenced" by: "the failure of the Third Engineer and the Second Engineer to close the main intake valve on deck or in the engine room in sufficient time to prevent the overflow" (14a).

It is further submitted that the mere fact that the TRADE DARING's personnel were not able to avert the disastrous consequences of the emergency situation created by the breach of warranty of the personnel of the MOBIL TRADER is hardly evidence of fault. This is no case in which to apply the doctrine of *res ipsa loquitur* and reason from the fact of the casualty that contributory negligence was its cause.

POINT II

The Damages Proximately Caused by Defendants' Breach of Their Warranty of Workmanlike Service Should Not Be Reduced by Alleged Contributory Negligence That Did Not Prevent or Hinder the Defendants From Performing Their Duties.

The defendants warranted to the plaintiff that they would perform the bunkering operations in a reasonably workmanlike manner. This warranty is implied in the undertaking to bunker a vessel. *Fairmont Shipping Corp. v. Chevron International Oil Company, Inc.*, 371 F. Supp. 1191 (S.D.N.Y. 1974), *aff'd.*, 511 F. 2d 1252 (C.A. 2, 1972).

The doctrine of implying a warranty of workmanlike service in maritime contracts for servicing a vessel was enunciated by the United States Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) at pages 133-134.

The application of this warranty of workmanlike service has since been made to many different types of maritime service contracts. *United States v. San Francisco Elevator Company*, 512 F. 2d 23 (C.A. 9, 1975) at page 26 (elevator subcontractor); *United New York Sandy Hook Pilots' Ass'n. v. Rodermond Industries, Inc.*, 394 F. 2d 65 (C.A. 3, 1968) at page 70 (ship cleaning subcontractor); *Tebbs v. Baker-Whiteley Towing Co.*, 407 F. 2d 1055 (C.A. 4, 1969) at page 1058 (towage contractor); *H & H Ship Service Co. v. Weyerhaeuser Line*, 382 F. 2d 711 (C.A. 9, 1967) at pages 712-713 (ship repair contractor); but see *Great American Insurance Company v. Bureau Veritas*, 338 F. Supp. 999 (S.D.N.Y. 1972) at pages 1013-1015 (ship classification society). See the opinion of the Court of Appeals in *Fairmont v. Chevron*, *supra*. 511 F. 2d at pages 1259-1260.

This duty of workmanlike service was owed to the plaintiff as a beneficiary of the bunkering contract, not only by defendant Mobil Sales, the original "contractor", but also by the actual supplier, Mobil Oil. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, *supra*, as applied in *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959) at page 428. See also *United States v. San Francisco Elevator*, *supra*, at page 27.

The fact that Mobil Sales employed a subcontractor to perform the bunkering contract does not insulate Mobil Sales from liability. Its contractual duty to perform the bunkering operation in a reasonably workmanlike manner is non-delegable. See the District Court's opinion in *Fair-*

mont Shipping Corp. v. Chevron International Oil Co., *supra*, 371 F. Supp. at page 1197 and the Court of Appeals opinion at page 1259, note 12, page 616. See also *United New York Sandy Hook Pilots' Ass'n. v. Rodermond Industries*, *supra*, at page 74; and Restatement of Contracts (1932), Section 160(4).

The law is clear that alleged contributory negligence will not bar indemnity where the damages have been proximately caused by a marine contractor's breach of its duty of performing its services in a workmanlike manner.

The faults with which the plaintiff is charged in the Court's Opinion, were not, even if sustainable on the facts, of the kind that justify a reduction or apportionment of damages. *Italia Societa per Azioni di Navegazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964) at page 320.

It has been held that recovery for breach of warranty is not defeated or diminished by a plaintiff's negligence except in those cases where the plaintiff's negligence actively prevented or hindered the defendant from performing his duty. The rationale of the principle is that the contractor, holding itself out to be an expert, is in a better position than the contractee to exercise that total control necessary to bring about the desired result.

The Court stated in *Henry v. A/S Ocean*, 512 F. 2d 401 (C.A. 2, 1975) at page 407:

"The shipowner's own conduct will preclude it from obtaining indemnity from the stevedore only where it prevented or seriously handicapped the stevedore in his effort to perform his duties. 'Merely concurrent fault is not enough.' *Albanese v. N. V. Nederl. Amerik. Stoom-Maats*, 346 F. 2d at 484, citing *Misurella v. Isthmian Lines*, 328 F. 2d 40 (2d Cir. 1964) and *Weyerhaeuser S.S. Co.*, *supra*."

Nothing the plaintiff did hindered or prevented defendants from executing the order to halt the flow of bunkers.

As set forth in a recent case, quoting the Supreme Court's opinion in the *Oregon Stevedoring Co.* case, *supra*, "liability should fall on the party best suited to adopt preventive measures and thereby reduce the likelihood of injury." *LeBlanc v. Two-R Drilling Company*, 527 F. 2d 1316, 1320 (C.A. 5, 1976).

That rationale clearly applies to the case at bar. Vessels of many nations, of many designs and in various conditions, call at the port of New York for bunkers. There are many occasions when prompt and proper action by the bunkering facility is required to avert a potential casualty, hence the necessity for having a man posted at the pumping station ready and willing to act. (Ex. Vol. 297). Those who perform the bunkering services are expected to be expert and alert at their job. They should not be heard to complain about the alleged technical faults of others, faults that would not even come into play if they, the experts, had simply carried out their own duties promptly.

The plaintiff's alleged "faults" (See Point I *supra*), were not faults at all. The plaintiff's acts or conduct were not of the kind or character that could, by any reasonable exercise of the imagination, hinder or prevent the defendants in the performance of their duties. What the Court below, in effect, has held is that on all of the frequent occasions when a vessel orders somewhat more bunkers than it can carry, the bunkering facility is excused, to a very great extent, from disregarding the vessel's order to "stop pumping."

The other alleged "fault," failure to stop the overflow after it had begun, clearly took place *after* the fault of

the bunkering barge and could in no way be said to have contributed to the defendants' failure to execute the order to "stop pumping."

The same result follows if the alleged faults of the TRADE DARING are treated under the rubric of "proximate cause." The fault of one party is not the proximate cause of an injury if the injury would not have occurred but for the supervening or intervening negligence of another. A "condition" must be distinguished from "cause". *P. Dougherty Co. v. United States*, 207 F. 2d 626 (C.A. 3, 1953) at pages 630-632. See also 57 *Am. Jur.* 2d, Negligence, Sections 145 and 196.

The overriding fact in this case is that the fire would never have occurred if the defendants had not breached their warranty of workmanlike service. Ordering more bunkers than the vessel required was not a fault: many vessels do as a matter of course and bunkering personnel know this. Failing to "catch" defendants' breach of warranty in time to prevent an overflow was not a fault: the TRADE DARING's personnel did the best anyone could reasonably be expected to do when the defendants thrust the emergency situation upon them.

In the circumstances, the Trial Court erred in holding that any act or conduct of the plaintiff was a contributing cause of the fire.

POINT III

The Court Below Erred in Apportioning Fault.

The Court below erred in holding the TRADE DARING or its owner at fault in any degree. See Point I, *supra*.

Assuming for purposes of argument, however, some residue of doubt that the overflow and resultant fire could have occurred without some scintilla of fault on the part of the TRADE DARING or its personnel, that "fault" must be so minimal that the apportionment made by the Trial Court must be held egregiously wrong.

As noted in Point I, *supra*, the initial so-called "fault" of the plaintiff found by the Trial Court consisted, in effect, of creating a "false impression" in the minds of the defendants' personnel that they could disregard an order to "stop pumping." The basis of the "false expectation" is without support in the evidence and is indeed contradicted by defendants' own witnesses. Vessels bunkering in New York do frequently order more bunkers than required. Bunkering personnel are familiar with this practice and have established signals which they are accustomed to following when the "stop bunkering" order is given. Third Engineer Bafaloukis gave this signal which was acknowledged (Ex. Vol. 73-74; Ex. Vol. 1 [Photographs "5" and "6"]).

The only other alleged contributory fault found by the Trial Court was that the TRADE DARING's personnel were not adequately trained to deal with the overflow. The Trial Court concluded this because of "the failure of the Third and Second Engineers to close the main intake on deck or in the engine room in sufficient time to prevent the overflow." This is reasoning backwards in the manner of applying the doctrine of *res ipsa loquitur*. Obvi-

ously, they "failed" to close any intake in "sufficient time": the overflow occurred. But the test is: did they act with reasonable prudence? The prudence and propriety of an action are not to be judged by the event, but by the circumstances under which it was done. 57 *Am Jur* 2d, Negligence, § 91 at page 438. See also *Andros Shipping Co. v. Panama Canal Company*, 298 F. 2d 720 (C.A. 5, 1962). The prudence and propriety of the actions of the Second and Third Engineers of the TRADE DARING when confronted by the emergency created by the defendants cannot be determined simply by looking at the result, but in determining what they in fact did.

1. The Third Engineer by signal and voice ordered the MOBIL TRADER to stop bunkering. The Pumpman acknowledged the signal with an "Okay."
2. The Third Engineer closed the manholes through which he had been observing the levels of the bunkers in the side tanks and went to advise the Chief Engineer that bunkering was completed. The bunkering hose was left to drain.
3. As soon as the Third Engineer noticed the overflow in the sight glass, he raced to the deck to see if the MOBIL TRADER was still pumping, calling out to the Second Engineer that there was an overflow.
4. The Second Engineer glanced at the overflow pipe sight glasses and immediately ran to close off the intake valve in the Engine room, "even if the pipe burst."
5. The Third Engineer went on to the deck and, together with the Master, again called out to the Pumpman who was nowhere in sight. Eventually the Pumpman came from behind the accommodation space. He

acknowledged the signal and manipulated some valves on the deck of the MOBIL TRADER, while the Third Engineer shut off the valve intake on deck.

In brief, the "fault" of the TRADE DARING was in failing to assume that the MOBIL TRADER would not stop pumping after acknowledging the order, or in not "catching" in time the serious fault of the MOBIL TRADER.

The defendants' breach of warranty and fault was active and initiatory: it set in motion the series of events that produced the fire. The alleged "faults" on the part of the plaintiff found by the Court below were not faults at all: they are simply artificial fruits of doubt nurtured by the obviously hindsight wisdom that the overflow and fire would not have occurred if: (a) plaintiff had ordered less bunkers; and (b) plaintiff's personnel had double-checked everything the defendants' personnel did.

The Court erred in holding defendants liable for only 25 percent of the plaintiff's damages.

CONCLUSION

The Trial Court erred as a matter of law in the following particulars:

1. In holding that the plaintiff was guilty of contributory fault in creating a "false impression" in the minds of defendants' personnel that the TRADE DARING could safely receive more bunkers than it actually required. The existence of any such "false expectation" was inconsistent with the testimony of defendants' witnesses, testimony apparently overlooked by the Trial Court. If such "false expecta-

tion" ever existed, it could not have survived the acknowledged order from the TRADE DARING to "stop bunkering."

2. In holding that the plaintiff was at fault because the plaintiff's personnel were unable to block the overflow created by defendants in sufficient time to prevent the fire. In reviewing what the TRADE DARING's personnel actually did when the overflow was apparent, there is nothing to adversely criticize. The Trial Court apparently overlooked or misread the evidence of what was actually done by the TRADE DARING's engineers after the overflow was discovered.
3. In holding that contributory negligence is a defense to an action for breach of warranty of workmanlike service when the alleged contributory negligence, assuming *arguendo* any existed, was not the kind that prevents or hinders the warrantor in performing his duties. *Henry v. A/S Ocean*, 512 F. 2d 401 (C.A. 2, 1975) at page 407.
4. In holding that the alleged contributory negligence, assuming *arguendo* any existed, was of the degree or character that warranted reducing to 25% the liability of the party whose gross breach of duty initiated the unbroken chain of causation that led to the loss.

Wherefore, it is respectfully submitted that the decision and order appealed from by plaintiff herein should be modified by adjudging the defendants liable for all damages sustained by the plaintiff without reduction or apportionment.

Respectfully submitted,

POLES, TUBLIN, PATESTIDES & STRATAKIS
Attorneys for Plaintiff-Appellant-Appellee
Navieros Oceanikos, S.A. and Third Party
Defendant-Appellee Trade & Transport Inc.

THEODORE P. DALY
 ALAN VAN PRAAG
Of Counsel

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Attorney(s) for
Rigam, Englar, Jones & Houston